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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 240

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 and 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL., *Petitioners*

v.

JEWEL TEA COMPANY, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

I. REPLY TO GOVERNMENT'S POSITION ON THE APPLICATION OF THE ANTITRUST LAWS TO LABOR ACTIVITY

Under the beguiling lure of deciding no more than necessary, the Government would initiate a major revision in the application of the antitrust laws to labor activity. Perhaps the moral to be drawn from the Government's position should be stated at the outset. Not only may hard cases make bad law. So too may easy cases by making it possible to assign the wrong reasons for the right result.

1. *The Government's position:* We begin by stating our understanding of the Government's position as a preliminary to treating with it.

The subjects of labor agreements are divided into three classes: class 1 pertains to contracts upon mandatory subjects of collective bargaining "whose direct impact is confined to the labor market and which affect competition in product markets only consequentially;" class 2 pertains to contracts upon mandatory subjects of collective bargaining "of direct concern to employees which also operate as direct restrictions upon entry or competitive practices in a product market;" class 3 pertains to contracts restricting commercial competition "which benefit employees only indirectly by enabling employers to increase the earning power of the business and thus to pay higher wages." (Govt. br. pp. 25-26, 52.)

Subject to a number of qualifications, agreements in classes 1 and 2 are not contracts "in restraint of trade" prohibited by section 1 of the Sherman Act. The fact of agreement and its anticompetitive consequences, either intentional or in inherent effect, are immaterial (Govt. br. p. 36.) Two qualifications apply to agreements in each class. *First*, a labor organization which operates a business would violate section 1 by using its leverage as a union to suppress competition with its business enterprise. *Second*, the union violates section 1 when the restriction the agreement imposes is established in collaborative aid of an independent conspiracy of businessmen. (Govt. br. pp. 33-34, 44-45.) To bring a case within qualifications 1 and 2, proof independent of the agreement and its economic consequences is essential (Govt. br. pp. 36, 44-45), but it is unclear whether the agreement and its consequences may be considered once independent evidence is adduced, nor is it clear how much and what kind of independent evidence would suffice to widen the inquiry into consideration of the agreement and its consequences.

A third qualification is expressed concerning agreements in class 2. An agreement would violate section 1 of the Sherman Act which, while nominally yielding a direct benefit to employees, is shown to be a subterfuge for manipulation of the product market in the interest of employers (Govt. br. pp. 45, 58). Although not committing itself the Government inclines to the view that, to bring qualification 3 into play, there should be independent proof, beyond any inference to be drawn from the agreement itself, showing that the contract is essentially an anticompetitive device (Govt. br. p. 46.) Otherwise the test leads back to an appraisal of the desirability of the benefit to the employee as opposed to the consequence of the restriction (*ibid.*), an approach which the Government abjures (Govt. br. pp. 32-33, 40-44). On the view that proof independent of the agreement is required, there seems to be no essential difference between qualifications 2 and 3. In any event, there would appear to be no way to establish that a restriction is a mere device except by independent proof. Finally, the only other way to distinguish between qualifications 2 and 3 is on the assumption that, while the contractual restriction is a device, it is the union's independent idea imposed on resisting or indifferent employers, rather than adopted as a collaborative aid to an independent businessmen's conspiracy. The examples given do not support this assumption (Govt. br. p. 45). Furthermore, on this assumption, the situation more fittingly belongs to agreements in class 3, to which we presently turn, and is not appropriately expressed as a further qualification on class 2 agreements. Accordingly, in view of the Government's ambivalence, its lack of clarity, and the correct classification of qualification 3 either as indistinguishable from qualification 2 or as a class 3 agreement, we do not further consider it as a separate category. This also means, we believe correctly, that there is no practical adjudicative distinction between class 1 and 2 agreements, and no practical adjudicative distinction between the qualifications assertedly applicable to each. The Government seems to agree, for it states that

in class 1 and 2 agreements, while the agreements are analytically different, "the legal conclusions are substantially the same" (Govt. br. pp. 26, 52-53).[1]

This leaves the class 3 agreement which, to repeat, imposes a direct restriction on commercial competition related to benefit to employees only by enabling employers to increase the earning power of the business and thus to pay higher wages. Since the Government would impose qualifications 1 and 2 upon agreements in classes 1 and 2, obviously at least the same qualifications would apply to agreements in class 3. The question then becomes whether an additional qualification should apply. The only additional qualification which can exist which would be distinctively applicable to a class 3 agreement can be expressed by posing the following question: Is a class 3 agreement reached as a result of arm's length collective bargaining, consummated independently of aid to a businessmen's conspiracy, prohibited by section 1 of the Sherman Act? It is this question which the Government would pretermit.

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[1] As nothing ultimately turns on it, we do not pause to consider the validity of the distinction between class 1 and 2 agreements. It may be noted that, as the point of the distinction is influence upon competition, the effect of the class 1 agreement is ordinarily likely to be more significant competitively than the effect of the class 2 agreement. Compensation for work still remains the greatest contribution to the cost of the labor bargain and therefore exerts the heaviest influence upon price competition. The idiom of "direct" and "consequential" effect, or "labor market" and "product market," does not measure impact on commercial competition, but reflects an impression that the justifiability of the impact is perhaps different depending on its source. That analysis in these terms leads nowhere is convincingly shown by the lack of consequence resulting from articulation of the separate classifications. Contrast also the inclusion of "work schedules" as a class 2 item with this Court's matter-of-fact recognition that "problems of work scheduling and shift assignment have been held to be appropriate subjects for collective bargaining under the Federal Act as administered by the National Labor Relations Board." *Amalgamated Association* v. *W.E.R.B.*, 340 U.S. 383, 399.

2. *The essential differences between petitioners' and the Government's position:* It will help at this stage to identify the points of divergence of petitioners' position from the Government's.

(a) A class 1 and class 2 agreement is not subject to qualification 2. The agreement is on a matter within the scope of mandatory bargaining. It fixes a labor standard. It consummates a statutory duty to bargain. As to such an agreement there is no room for inquiry into whether or not the agreement is a product of union aid to an independent antitrust conspiracy among businessmen.

(b) A class 3 agreement is a contract upon a subject outside the scope of mandatory bargaining. If the agreement is illegal when entered into between businessmen without union abetment, it is no less illegal when union abetment is added to the businessmen's conspiracy. This is *Allen Bradley*. This is the proper and only scope of qualification 2. An agreement which is the product of union abetment of a business conspiracy is, however, radically different from an agreement reached as a result of arm's length bargaining—a union and employers arrayed on opposite sides bargaining independently and adversely. The validity of a class 3 agreement which is the product of arm's length bargaining is inherent in *Allen Bradley*. To pretermit the legality of such an agreement is to pretermit the continuing vitality of *Allen Bradley* and thus to throw the entire subject into utter uncertainty.

(c) A word as to qualification 1. A union that owns and operates a business is no different from any other business entity when it acts in its entrepreneurial capacity. It has no antitrust immunity of any kind when it operates a consumer buying service for its members, constructs a building or leases space in it, or runs a medical center or recreation camp. This is not a qualification of an immunity but a caveat that a union as an enterpreneur has no immunity. But this caveat has no application in this case and not

even colorable application in *Pennington*. For the maximum that the evidence shows in *Pennington* is that the UMW owned stock in a coal company, held stock in that company and its subsidiary as collateral on loans, and the stock owned outright and held as collateral in the company aggregated more than one-half of the company's common stock (325 F.2d at 813-814). This shows that as stock owner and creditor the UMW had a substantial interest in the company. It does not begin to show that the UMW exercised its authority as bargaining representative to protect or enhance its business investment. And, unless suspicion is to rule, there must at minimum be a direct evidentiary nexus between action taken by the union in its capacity as bargaining representative and action taken by it in its separate capacity as enterpreneur before its business interest even becomes relevant.

(d) In sum, despite the Government's elaborate and somewhat rarified analysis in terms of classes of agreement and categories of qualifications, the questions distil to two. (1) Is an agreement which fixes a labor standard within the scope of mandatory bargaining subject to invalidation upon proof that the level at which the conferred benefit is set is the product of union abetment of an independent conspiracy of businessmen? Petitioners answer no and the Government yes. (2) Is an agreement upon a subject outside the scope of mandatory bargaining, which would constitute an antitrust violation if entered into exclusively between businessmen, subject to invalidation even though it is the product of arm's length bargaining between a union acting in its own interest to serve a labor end, on the one side, and a group of employers negotiating independently and adversely, on the other side? Petitioners answer no and the Government would pretermit the question.

3. *An agreement upon a mandatory bargaining subject—the so-called class 1 and 2 agreement—is not within the coverage of the Sherman Act:* A labor agreement upon a

mandatory subject of collective bargaining is outside the scope of the Sherman Act. The agreement is by hypothesis "with respect to wages, hours, and other terms and conditions of employment." NLRA, § 8(d). Regardless of the level of the benefit or protection it is still a labor standard that is fixed. The standard is not distinguishable for antitrust purposes by its content; it is all the same whether the wage is high or low, or the hours short or long, or the work allocated to the unit wide or narrow. And the Government grants that the anticompetitive consequences of the labor standard, either in purpose or effect, are irrelevant. As neither the content nor consequence of the labor standard makes a difference, there is nothing left. Of no agreement which is subject to inquiry under the Sherman Act would it be possible to say that its terms and intentional or inherent effect are irrelevant. On the contrary, " 'such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.' " *Appalachian Coals* v. *United States*, 288 U.S. 344, 360. When the minimum criteria relevant to a Sherman Act inquiry are not germane, the candid conclusion which is required is that "Every contract . . . in restraint of trade" does not include an agreement "with respect to wages, hours, and other terms and conditions of employment."

In the seventh decade of the Sherman Act, 75 years after its enactment, it is nevertheless for the first time seriously suggested in this Court that the labor standard itself—the level at which the benefit or protection is fixed—can be adjudged an instrument of an antitrust restraint. *Pennington* forcefully presents the point. Compensation for work is at the innermost core of mandatory bargaining. Yet central to the alleged conspiracy in *Pennington* is the claim that the hourly wage rate and the contribution to the Welfare Fund were set at a level designed to eliminate

the competition of the smaller companies by making the labor cost too high for them to pay. To say that the conspirators' anticompetitive intent entered into the determination of the wage scale and placed it higher than it would otherwise be requires a judgment by a court or jury that a lower rate would have been agreed upon as a fair return for work had the labor and management negotiators bargained free of anticompetitive design. The judgment called for is an impossibilty. In *Pennington*, absent the alleged conspiracy, would the wage rate and royalty contribution have been lower? Should it have been lower? If *Pennington* were an equity action for injunctive relief, what would be the appropriate remedy to reach the labor cost which is at the heart of the alleged antitrust violation? A judicial determination of the wage rate? A judicial nullification of the existing rate with a direction to negotiate a lower one? A judicial maintenance of the *status quo* pending fulfillment of the same direction? And if *Pennington* were a criminal action, should men be jailed or fined for the compensation for labor that they have negotiated?

The Government does not avoid the difficulty by its suggestion that "a critical inquiry in the *Pennington* case would seem to be whether the verdict is or is not supported by evidence, *independent of the agreement and its economic consequences*, showing that the union was coming to the aid of a conspiracy of employers or seeking to advance its business investment rather than the interests of its members in the increased compensation" (Govt. br. pp. 36-37, emphasis supplied). The dichotomy is artificial on its face. Try to imagine on any evidence a sensible judgment that in agreeing to a higher wage the union was indifferent to "the interests of its members in the increased compensation." The most that could be said on any evidence is that the union had a double motive. Is the result then to turn on the union's dominant motive, or is the wage rate to be found legal because a valid motive contributed to its determination, or is it to be found illegal

because an invalid motive was part of the whole? "Neither the test of 'object' nor 'necessary effect' gives a satisfactory answer to the question. Even if his dominant motive was . . . [to increase compensation], John L. Lewis would not be blind to the other consequences or leave them out of his calculations. Were they therefore 'an object' of the combination? If not, were they a 'necessary effect'?" Cox, *Labor And The Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 282 (1955). As the Government states, "Juries should not be allowed to speculate about why a union bargained for increased compensation" (Govt. br. p. 36).

Furthermore, it is highly unrealistic to formulate an inquiry in terms of evidence "independent of the agreement and its economic consequences . . ." The agreement has to be admitted into evidence. The independent evidence would not be intelligible without it, particularly if the claim were made that the agreement was the culmination of an antitrust plot. Nor could the economic consequences of the agreement be disregarded. It would be perverse to say that the probative value of the independent evidence, pro and con, should not be weighed in the light of the intrinsic character of the agreement, either to fortify or neutralize the inferences that the independent evidence permits. As in *Pennington*, the very fact that the agreement is one for compensation for labor goes very far (in our view all the way) to destroy the claim that it is an antitrust artifice. And, as in *Jewel*, the unions will in defense adduce the evidence of origin, history, economic context, reason for being, and the details of the negotiation of the challenged provision in order to demonstrate that it is free of anticompetitive content in the antitrust sense. In the end, one way or another, the entire panoply of economic fact becomes relevant, and judges and juries are of necessity "allowed to speculate about why a union bargained for increased compensation" (Govt. br. p. 36), or any other labor standard within the scope of mandatory bargaining.

The risk is purposeless. Once the fact of agreement and its economic consequences are recognized as irrelevant, what is left is not worth agonizing over. For, whatever the myriad of influences that enter into its determination, it is still a labor standard within the scope of mandatory bargaining which is fixed, and therefore by definition the subject of agreement is "with respect to wages, hours, and other terms and conditions of employment." Whether a contested subject is within or without this class is a preliminary, separate and fundamental threshold question whose determination belongs to the National Labor Relations Board. Subsumed within that determination will be a judgment resolving the interplay of reasons for committing the subject to or excluding it from the domain of "wages, hours, and other terms and conditions of employment." But once determined that it is within this field, it is then outside the purview of the Sherman Act.

We therefore draw the coverage line at mandatory subjects of collective bargaining. That is the same line that this Court drew in *Allen Bradley*. In that case there were "industry-wide understandings, looking not merely to terms and conditions of employment *but also to price and market control*. Agencies were set up composed of all three groups [the union-contractor-manufacturer combination, 325 U.S. at 807] to boycott recalcitrant local contractors and manufacturers and to bar from the [New York City] area equipment manufactured outside its boundaries." 325 U.S. at 799-800. And "this combination of business men" "intended to and did restrain trade in and monopolize the supply of electrical equipment in the New York City area to the exclusion of equipment manufactured in and shipped from other states, and did also control its price and discriminate between its would-be customers" (325 U.S. at 800-801). Exclusion from the market and price control were thus at the center of the scheme. Such trade restraints are not mandatory subjects of collective bargaining. While we share the Government's apprehension concerning premature generalization of the compass of

obligatory negotiation,[2] we have no hesitancy in saying that a subject is not within that scope when its sole relationship to "wages, hours, and other terms or conditions of employment" is that diminution in competition by predatorily restraining trade will make the company more prosperous and thus enable it to pay better wages and provide more work. That was the sole relationship in *Allen Bradley*. And that does not suffice to exclude a subject from the coverage of the Sherman Act. But *Allen Bradley* does not suggest, and it is a distinct extension of its holding to contend, that increasing wages or shortening hours or otherwise fixing labor standards can be brought within antitrust proscription upon a showing that the improvement was the product of union abetment of a businessmen's conspiracy to diminish competition, an inquiry itself highly unrealistic when directed to the reason for adopting a labor standard.[3]

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[2] In *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, this Court indicated that the exclusive bargaining authority of a union is not to be taken "as 'preeluding such individual contracts' as the Company might 'elect to make directly with individual employees.'" That dictum had to yield. *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332. In the latter case, this Court indicated that matters "not necessarily included within the statutory scope of collective bargaining" include such subjects "as stock purchase, group insurance, hospitalization, or medical attention" (*id.* at 339). And that dictum had to yield. *Inland Steel Co.* v. *N.L.R.B.*, 174 F.2d 875 (C.A. 7), cert. denied on this point, 336 U.S. 960; *W.W. Cross and Co.* v. *N.L.R.B.*, 174 F.2d 875 (C.A. 1); *Richfield Oil Corp.* v. *N.L.R.B.*, 231 F.2d 717 (C.A.D.C.), cert. denied, 351 U.S. 909.

[3] In its brief (p. 34), the Government suggests that this Court regarded the situation in *Allen Bradley* as one in which "the employer's conspiracy originated from a union proposal." Jewel takes this position more directly (Res. br. p. 42). This is not accurate. Cox, *Labor And The Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 270-271 and n. 90 (1955). It attributes to the majority of the Court a view of the facts taken by the minority and by the courts below but not by the majority.

Unlike the Government (br. pp. 34-35), while we agree with it that *Philadelphia Record Co.* v. *Manufacturing Photo-Engravers*

The Government balks at the conclusion primarily because the words "terms or conditions of employment" appear identically in § 8(d) of the National Labor Relations Act defining mandatory subjects of collective bargaining and in § 13(c) of the Norris-LaGuardia Act defining a "labor dispute"; it states that what constitutes a term or condition of employment under one section is equally so under the other; it fears that by reading "terms or conditions of employment" too expansively too much will be swept under antitrust immunity via the definition of a "labor dispute," and that by reading the phrase too restrictively too much will be excluded from the scope of mandatory bargaining under § 8(d); it therefore resolves its dilemma by enlarging the field of Sherman Act coverage to include mandatory matters of collective bargaining which

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Assn. of Philadelphia, 155 F.2d 799 (C.A. 3), was correctly decided, we do not read the case as an instance of antitrust application to an agreement upon a mandatory subject of collective bargaining. It presented a situation of bare union direction to the men to refuse to work for a particular employer on commercial photo-engraving at night, although the same men were at the same time for the same employer at work at night on newspaper photo-engraving, the refusal to work constituting naked union abetment of a businessmen's scheme to eliminate that particular employer as a competitor in the commercial photo-engraving field. There was no objection to night work as such; there was no objection to work load, the men doing the commercial photo-engraving in the "slack periods" when there was no newspaper photo-engraving for them to do (*id.* at 801); there was no "grievance or dispute . . . as to labor or working conditions" (*ibid.*); indeed, it does not appear that the union was acting in its self-interest to further the working welfare of the employees either directly or indirectly in any way. The only union activity was the refusal to work, and in the circumstances its occurrence at night is as irrelevant as it would be had it taken place during the day. Nocturnal refusals-to-work do not stand on a higher level than daylight strikes. It is doubtful that the union was even acting "in its self-interest" (*United States* v. *Hutcheson*, 312 U.S. 219, 232), and it is certain that it was not acting to regulate "wages, hours, and other terms and conditions of employment."

are made subject to antitrust prohibition within the limitations of the *Allen Bradley* qualification of labor immunity. (Govt. br. pp. 18-22, 50-53.)

The dilemma is unreal. While the phrase "terms or conditions of employment" covers the same subjects under § 8(d) and § 13(c), the function and legal consequence of embracing a subject within this phrase is very different under each section. Every controversy over a mandatory subject of collective bargaining is a labor dispute, but not every matter within the compass of a labor dispute constitutes a mandatory subject of collective bargaining. The point is explicit in *Allen Bradley*. The union's aim in *Allen Bradley* was "to expand its membership, to obtain shorter hours and increased wages, and to enlarge employment opportunities for its members" (325 U.S. at 799). It was promotion of this aim which gave the controversy its statutory character as a labor dispute. Said the Court (325 U.S. at 807, n. 12):

> It has been argued that no labor dispute existed. The argument is untenable. . . . Local No. 3 is a labor union and its spur to action related to wages and working conditions.

Part of the means used by the union to further its aim was union abetment of market monopoly and price control by a businessmen's combination. This brought these trade restraints within the scope of the labor dispute. But to bring them within the scope of a labor dispute does not bring them within the scope of mandatory bargaining. For the inclusion of the trade restraints within the ambit of the labor dispute results, not from the fact that they constitute in themselves "terms or conditions of employment," but from the fact that they are elements of a "controversy concerning terms or conditions of employment." That market monopoly and price control are part of the controversy creates in itself no duty to bargain about them.

The functional difference between the definition of a labor dispute in § 13(c) and the duty to bargain enjoined by § 8(d) is crucial to an understanding of the correct reach of each. For example, a work stoppage in violation of a no-strike agreement over a grievance open to adjustment under the arbitral machinery of the collective bargaining agreement is not enjoinable in a federal district court because it involves a labor dispute. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195. This is in keeping with the purpose of Congress to withdraw the federal courts from intervention in labor disputes. Nevertheless, while the strike is not enjoinable because it involves a "controversy concerning terms or conditions of employment," the employer is under no duty to bargain about the grievance during the period of the strike even though "terms or conditions of employment" are the essence of the grievance. "As the contract provided for a detailed procedure of adjusting grievances, the . . . [employer] could lawfully refuse to process the grievance . . . while the strike was in progress." *Charles E. Reed Co.*, 76 NLRB 548, 550. For "the stability of labor relations that the statute seeks to accomplish by the encouragement of the collective bargaining process ultimately depends upon the channelization of the collective bargaining relationship within the framework of a collective bargaining agreement, *and the adherence thereto* by the contracting parties." *United Elastic Corp.*, 84 NLRB 768, 773.[4] Suspension of the duty to bargain about the grievance until the strike is terminated is in keeping with the institutional demand that collective bargaining itself exerts. Accordingly, based on the difference in statutory function, the identical dispute evokes different legal consequences.

The Government is therefore quite mistaken when it equates the scope of mandatory bargaining with the scope

[4] See also, *Higgins, Inc.*, 90 NLRB 184; *UE, Local 1113* v. *N.L.R.B.*, 223 F.2d 338, 344 (C.A.D.C.), affirming, 106 NLRB 1171, 1180.

of a labor dispute. There is thus no reason to fear that the sweep of a labor dispute would determine the subject matter of mandatory bargaining. The desiderata of collective bargaining under the National Labor Relations Act control that question. The duty to bargain which that determination channels, and the agreement which is the consummation of the fulfillment of that duty, is "with respect to wages, hours, and other terms and conditions of employment." That field is not within the purview of the Sherman Act. This does not claim or result in "complete immunity" (Govt. br. p. 17), "automatic exemption" (*id* at 24), "total labor exemption" (*id.* at 53), or "complete exemption" (*id.* at 71). *Allen Bradley* marks the limit of labor immunity. It applies to labor activity outside the scope of mandatory bargaining. To bring *Allen Bradley* into the field of mandatory bargaining does not maintain the *status quo;* it enlarges the area of antitrust application.

4. *A class 3 agreement consummated as a result of arm's length bargaining is exempt from the Sherman Act:* To pretermit this question, as the Government would, is to pretermit the continuing vitality of *Allen Bradley.* For the validity of a class 3 agreement arrived at by arm's length bargaining is inherent in *Allen Bradley.* The holding in that case means, as this Court said, "that the same labor union activities may or may not be in violation of the Act, dependent upon whether the union acts alone or in combination with business groups" (325 U.S. at 810). The conduct "is not illegal by reason of the union's war aims but only because of its choice of allies."[5] A union joins with no one when vis-a-vis the employer group it bargains independently and adversely and reaches an agreement in consummation of that activity. It would be a total absurdity to say that the union may wage war but not make peace.

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[5] Dodd, *The Supreme Court And Organized Labor, 1941-45,* 58 Harv L. Rev. 1018, 1051.

A step-by-step analysis confirms the conclusion. As has been said, there is in *Allen Bradley* "no intimation that the Court might permit '. . . antitrust prohibition of an agreement between one union and one employer requiring conduct whose object is some direct market restraint.' In such a case there is no illicit combination of business firms to aid or abet." Cox, *Labor And The Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 271 (1955). The second step is also clear (*ibid.*):

> Nor is there reason to doubt the soundness of the majority's assumption that a union does not violate the antitrust laws by negotiating parallel restrictive agreements with competing business firms. In this situation, there may be sufficient evidence of combination among the employers if each knows the others' actions, but the law could not tolerate the paradox of sanctioning strikes for uniform agreements while proscribing them as treaties of peace.

This takes care of single-employer and pattern bargaining and leaves only multi-employer bargaining for which to account. As to the latter, it has been said, "An association of employers which bargains as a unit ought to have the same privilege of surrendering to union demands as a series of individual firms, yet such an arrangement plainly does involve a combination of business firms." Cox, *supra*, at 271. The "yet" is pointless. For to show a combination of business firms plainly does not show union alliance with that combination. And that is the crucial thing. The simple clear fact is that multi-employer bargaining conducted at arm's length does not constitute union abetment of a business combination. It is indeed a self-defensive form of employer bargaining designed to match union strength. *N.L.R.B.* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87. If the agreements which eventuate from single-employer and pattern bargaining are immune, it compounds absurdities to withdraw immunity from an agreement which eventuates from multi-employer

bargaining, itself a legal and beneficial form of negotiation. Illegality cannot sensibly result from mere recourse to it. For example, in steel, until 1956 separate negotiations were conducted with each of the individual employers; since 1956, bargaining with respect to the basic economic issues has been conducted with a four-man coordinating committee representing the eleven major steel companies. The immune agreement which resulted from pattern bargaining before 1956 surely did not become a vulnerable agreement after 1956 because of the institution of joint negotiations. Agreements which emerge from pattern bargaining have no lesser economic impact, if that is relevant, than agreements which emerge from multi-employer bargaining. And so, once granted the immunity of agreements which result from single-employer and pattern bargaining, the immunity of those which result from multi-employer bargaining exists as a matter of course.

The Government's position is internally inconsistent. With respect to class 1 and 2 contracts it grants that the agreement standing alone is immune, and it would require independent evidence of union abetment of a business conspiracy to invalidate it. As it states, it cannot "be seriously argued that multi-employer bargaining introduces an illegal element or is otherwise opposed to the national labor policy" (Govt. br. p. 32). But if multi-employer bargaining does not establish union alliance with employer groups in class 1 and 2 contracts, neither does it establish alliance in class 3 contracts. The only difference among the classes is the content of the agreement itself. The premise of *Allen Bradley* is that "the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the unions act alone or in combination with business groups" (325 U.S. at 810). The means used, not the end attained, is the test of illegality. The content of the agreement is therefore irrelevant.

This brings us to the true thrust of the Government's reservation. It frankly avows that the "eclectic approach

we advocate goes directly to Section 1, as Mr. Justice Stone did in the *Apex* case, and asks how its words and policy apply to the particular kind of contract involved when read in the light of the national policy expressed in labor legislation" (Govt. br. p. 52). Contrary to *Allen Bradley* the content of the agreement thus becomes relevant. The Government would then ask whether a class 3 agreement should be exorcised as an antitrust instrument if on balance the direct restriction on commercial competition it exerts is judged to be without sufficient redeeming labor value. It pretermits this question.

The law as it now exists allows no room for the Government's reservation. The Government would return to *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, as the fountainhead of the application of the antitrust laws to labor activity (Govt. br. pp. 28-29, 30, 38-39, 52, 56-57). But, except for the notable proposition that the elimination of differences in labor standards as an element of price competition is not prohibited[6] (310 U.S. at 503-504 and n. 24), history has left *Apex* behind. At issue in *Apex* was the legality under the antitrust laws of a violent sit-down strike to support a minority union demand for a closed shop agreement (*id.* at 481-482). The exact holding in *Apex* was that in the circumstances of that case the local strike to enforce a union demand did not result in the kind of restraint of commercial competition at which section 1 of the Sherman Act was aimed. Nevertheless, *Apex* warned, not all local strikes were outside the prohibition of the Sherman Act, but only those which were not intended to have, or did in fact have, anticompetitive market effects (*id.* at 512-513, 508-512). Thus, there was no disapproval of the view that if the purpose of a primary organizational strike was to stop the production of nonunion coal in order to prevent its shipment to a market where it would compete with

[6] The NLRA states in terms that an evil at which the statute is aimed is "preventing the stabilization of competitive wage rates and working conditions within and between industries." § 1, ¶ 2.

union-produced coal, the strike would be illegal (*id.* at 511-512). For the same reason secondary boycotts violated the Sherman Act (*id.* at 505-508), in that "the restraint operated to suppress competition in the market" (*id.* at 508); whether the self-interest of the union in strengthening its bargaining position, not considered sufficient justification before *Apex*, should be deemed to be enough vindication to permit the activity was passed over (*id.* at 506-508 and n. 25). The apparent essence of *Apex* was to judge the justifiability of labor activity by its intended or likely effect on commercial competition. It has been remarked that *Apex* "contains inconsistencies that emphasize" its "ambiguity" (Cox, *Labor And The Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 264 (1955)), and that whatever line it drew "distinguishing the legal from the illegal was an invitation to wholesale unprincipled judgments" (Winter, *Collective Bargaining And Competition: The Application Of Antitrust Standards To Union Activities*, 73 Yale L. J. 14, 41 (1963).)

Without of course disturbing the obvious permissibility of eliminating labor standards as a competitive element, this Court cut through and went beyond the *Apex* approach in *United States* v. *Hutcheson*, 312 U.S. 219. Inquiry into labor activity under the antitrust laws ends with the determination that the "union acts in its self-interest and does not combine with non-labor groups . . ." (*id.* at 232). The "practical consequence was to make the Sherman Act inapplicable to all combinations of employees regardless of the objective"; "In the absence of fraud or violence, the *Hutcheson* case immunized any restraint of trade imposed by a labor union." Cox, *supra*, at 265. The "*Hutcheson* case drew an end to the application of the Sherman Act to labor unions except when they joined in conspiracy with non-labor groups." Cox and Bok, Labor Law, Cases and Materials, 863 (5th ed. 1962). The departure from *Apex* is emphasized by the concurring opinion of Chief Justice Stone who wrote for the majority in *Apex*. He would have validated the jurisdictional strike in *Hutcheson* be-

cause it exerted no restraint on commerce different from any local strike (*id.* at 239-241), adding that "In any case there is no allegation in the indictment that the restraint did or could operate to suppress competition in the market of any product and so dismissal of these counts is required by our decision in *Apex* . . .." (*id.* at 241-242). *Allen Bradley* thereafter reaffirmed *Hutcheson* by its emphasis that union abetment of an independent conspiracy of business men was essential to deprive labor activity of its antitrust immunity. And Congress has voted down bills seeking to remove the labor exemption (Pet. br. p. 83, n. 16).[7]

It is too late "to turn the clock back to the day of the *Apex* case" (Cox, *supra*, at 263);[8] to relegate *Hutcheson* to endorsement of the self-evident proposition that the Sherman Act does not forbid the formation or operation of unions (Govt. br. p. 56); and to turn *Allen Bradley* into the absurdity that a union may not enter into an agreement for which it is free to bargain and strike.[9]

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[7] The Government acknowledges that there is no empiric evidence that the class 3 agreement is significant either in frequency or effect (Govt. br. pp. 54-55). An attempt to make a showing of an actual problem is usually a compound of declamation, horrors drawn from newspaper stories, and acceptance at face value of allegations of complaints. Despite the tumult the *Allen Bradley* situation happens to be quite atypical.

[8] A distinguished casebook neither reproduces nor abstracts *Apex*, noting merely that *Hutcheson* ended the development of the *Apex* doctrine. Cox and Bok, Labor Law, Cases and Materials, 109 (5th ed. 1962).

[9] The extent to which the Government would sweep the chessmen off the board is further indicated by its extraordinary statement that regulation of selling time is a "naked elimination of competition," by its bewildering doubt that *Board of Trade* v. *United States*, 246 U.S. 231, "remains good law," and by its mutilating assertion that *Board of Trade* "must be limited to its peculiar facts involving the unique problems of a commodity exchange" (Govt. br. p. 47)! See petition for writ of certiorari, pp. 33-37. See also,

5. *In summation:* The decisions below in *Pennington* and *Jewel* furnish fresh contemporary evidence of the unhappy history of the application of the antitrust laws to labor activity. Each amply attests the continuing reality of the danger of judicial interference in collective bargaining via the antitrust route. In this area "courts have neither the aptitude nor the criteria for reaching sound decisions." Cox, *supra*, at 269-270.

We can speak with confidence of the situation in *Jewel*. The antitrust action was instituted as a maneuver to secure through litigation what Jewel could not obtain at the bargaining table. Jewel without deviation had entered into agreements containing the limitation upon marketing hours since it began operating meat departments in Chicago in 1933 or 1934 (Pet. br. pp. 15-16). It entered into the 1957 negotiations with a full and unbroken history of participation in the limitation. And while in the 1957 negotiations it publicly proclaimed its belief that the limitation was invalid, it would nevertheless have been perfectly content with a modification that would have permitted one night of operation on Friday, leaving the limitation otherwise totally intact. Thus, it either proposed on behalf of itself (Pet. br. pp. 21, 24, 31), or joined with other employers in proposing (Pet. br. pp. 22, 27-28, 30), Friday night operation. Hence, despite its professed belief that the limitation was illegal, it was nevertheless completely willing to go along with it, provided only that it was modified to its satisfaction. Jewel was not offended

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for the allocation of selling time of tobacco among warehousemen, *Rogers* v. *Tobacco Board of Trade*, 244 F.2d 471 (C.A. 5); *Asheville Tobacco Board of Trade* v. *F.T.C.*, 263 F.2d 502 (C.A. 4); *Danville Tobacco Assn.* v. *Bryant-Buckner Associates*, 333 F.2d 202 (C.A. 4). "Competition is not an absolute. Every restraint of trade is not a violation of the antitrust laws; the decisive question is whether it is an unreasonable restraint, and this depends on the significance of the restraint in relation to the particular market under investigation." *Asheville Tobacco Board of Trade* v. *F.T.C.*, 263 F.2d 502, 511 (C.A. 4).

by the claimed illegality or averse to participating in an agreement perpetuating it almost in whole; it simply used the claim of illegality and the threat of a law suit to induce accession to its bargaining demand. Thus, on October 22, 1957, Jewel stated that: "We would much prefer to negotiate for *one or more* nights of operation and would abide by the results of such negotiations if they were satisfactory to us. But, if they are not, we felt impelled to litigate the matter even though our successful outcome of such litigation would inevitably mean that the market operations would automatically be opened to seven days a week, twenty-four hours per day, of operation" (Pet. br. p. 25). And, on November 22, 1957, in proposing Friday night operation and asking R. Emmett Kelly, the union's chief spokesman, to submit it to the members, Jewel wrote that "If the contract provision prescribing the hours of market operating is not relaxed so as to permit *at least one night of operation* to 9:00 p.m. in all areas, then the company intends to litigate the legality of this contract restriction". (Pet. br. p. 31). But it would not have litigated even total retention of the limitation upon market operating hours if it could obtain agreement upon female wrappers. For, after first asking R. Emmett Kelly to submit to the members Jewel's proposal of November 22, 1957 which included provision for Friday night operation *and* female wrappers (Pet. br. p. 31), Jewel then requested that, if the members rejected that proposal, the same proposal should be submitted but this time with Friday night operation *deleted* and female wrappers *retained*. (Pet. br. 32). Thus Jewel was willing to scrap even one night of operation in favor of agreement on female wrappers.

Jewel's exertion of the pressure of threatened litigation to secure its bargaining demand was avowed. Part of its purpose in securing a legal opinion expressing belief that the limitation was illegal was to use it in negotiations (Pet. br. p. 24). Associated Food Retailers first, then all the employers, and finally the union representa-

tives were read the opinion (Pet. br. pp. 24-25). Jewel "threatened to sue as a co-conspirator any employer who opposed night marketing operations . . ." (R. 666, Pet. br. p. 24). Exposure to a treble-damage judgment is itself coercive. The action began with a complaint which sought $25,000 trebled (R. 26-27); at trial the complaint was amended to $17,000,000 trebled (R. 78, Tr. 410); after trial the claim was reduced to $50,000 trebled; as a condition to the grant of a stay pending certiorari a bond in the sum of $500,000 was sought; and the Court of Appeals conditioned the stay upon securing a bond for $75,000. It is not comfortable to have to respond to questions of union officials, men of modest means with their own home as their main possession, that they risk a personal judgment for damages against them,[10] and it is not comforting to assure them that probably the unions' treasuries will be adequate to satisfy any judgment. To bargain in the face of an actual or threatened antitrust action is, as the unions' chief spokesman told the members at a contract ratification meeting, "negotiating with a gun in your back" (Pet. br. p. 32). A less resolute union group would have broken.

The reality of the danger of interference with collective bargaining is therefore very great, not only because of the risk of erroneous jury verdicts and judicial judgments, but also because of the vexation of the bargaining process and the yielding of bargaining positions which may result from the threatened or actual antitrust action regardless of its probable ultimate outcome.[11] And enlarged application of

[10] See *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 247-249.

[11] There is not much relief in the suggestion that "collective bargaining is now highly sophisticated" and "lawyers and economists" regularly participate in solving more complex problems (Govt. br. p. 59). Professional aides cannot do much to cushion the coercion of threatened or actual lawsuits. And a good deal if not most of collective bargaining is in any event still carried on

the antitrust laws to labor activity serves no compensating good. For the labor issues which have agitated the antitrust laws in the past have all since been directly dealt with by Congress in labor legislation as labor problems. Congress has curbed the secondary boycott [12] in § 8(b)(4)(B) of the NLRA, preserving from condemnation that manifestation of secondary influence deemed legitimate (*N.L.R.B.* v. *Fruit and Vegetable Packers*, 377 U.S. 58; *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46), and expressly noting that elimination of the secondary boycott made effectuation of an *Allen Bradley* violation impossible and therefore rendered amendment of the antitrust laws unnecessary (S. Rep. No. 105, 80th Cong., 1st Sess., 22; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 65; in 1 Leg. Hist. LMRA 428, 569). The jurisdictional strike [13] is regulated by § 8(b)(4)(D) in conjunction with § 10(k) of the NLRA (*N.L.R.B.* v. *Radio and Television Broadcast Engineers Union, Local 1212*, 364 U.S. 573). So-called featherbedding [14]—standby and make-work practices—has been regulated to the limited extent that Congress wishes to reach it by the Lea Act in broadcasting (*United States* v. *Petrillo*, 332 U.S. 1), by the Hobbs Act (*United States*

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without professional aides. The problem is not one to which professional expertness is relevant, although the "subtle accommodations" which the Government invites would indeed contribute independent interfering perplexities. A requirement of "subtlety" is inherently inhibitory, for it is the exceptional professional aide who will encourage innovation rather than warn against its risks.

[12] As an antitrust issue or implement, see *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U.S. 797; *Loewe* v. *Lawlor*, 208 U.S. 274; *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stonecutters*, 274 U.S. 37.

[13] As an antitrust issue, see *United States* v. *Hutcheson*, 312 U.S. 219.

[14] As an antirust issue, see *United States* v. *Hod Carriers*, 313 U.S. 539, affirming, 37 F. Supp. 191 (N.D. Ill.); *United States* v. *American Federation of Musicians*, 318 U.S. 714, affirming, 47 F. Supp. 302 (N.D. Ill.).

v. *Green*, 350 U.S. 415), and by § 8(b)(6) of the NLRA (*A.N.P.A.* v. *N.L.R.B.*, 345 U.S. 100; *N.L.R.B.* v. *Gamble Enterprises*, 345 U.S. 117). Strikes and cognate pressure by minority unions for organization or recognition[15] are controlled by §§ 8(b)(4)(C) and 8(b)(7) of the NLRA (*N.L.R.B.* v. *Drivers Local Union No. 639*, 362 U.S. 274). Contracting-out of work,[16] confirmed as a mandatory bargaining subject at its inner core (*Fibreboard Paper Products Corp.* v. *N.L.R.B.*, No. 14, October Term 1964), has the legal limits of its contractual control demarcated by § 8(e) of the NLRA. Apart from an enlarged area of activity permissible in the building and clothing industries by reason of the provisos to § 8(e), a union may secure contractual commitment of defined work exclusively to the employees in the unit it represents, and may limit the allowable subcontracting of that work to persons who maintain commensurate labor standards, but may go no further. *Meat and Highway Drivers Local Union No. 710* v. *N.L.R.B.*, 335 F.2d 709 (C.A.D.C.). And primary strikes[17] have been resoundingly safeguarded as protected activity by § 7 of the NLRA regardless of their economic proliferation (*Division 1287, Amalgamated Association* v. *Missouri*, 374 U.S. 74), with Congress limiting the scope of containment and illegalization to specifically defined situations and particularized objectives (*Amalgamated Association* v. *W.E.R.B.*, 340 U.S. 383, 389-390).

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[15] As antitrust issues, see *United States* v. *Building and Construction Trades Council*, 313 U.S. 539; *United States* v. *United Brotherhood of Carpenters*, 313 U.S. 539.

[16] As an antitrust issue, see *Pennington* v. *U.M.W.*, 325 F.2d 804, 813 (C.A. 6), cert. granted, 377 U.S. 929.

[17] As antitrust issues, see *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469; *Coronado Cases*, 259 U.S. 344, 268 U.S. 310; *United Leather Workers International Union* v. *Herkert & Meisel Trunk Co.*, 265 U.S. 457.

Thus, the route that Congress has travelled is to treat labor activity, not under the general umbrella of the antitrust laws, but as particularized labor problems to be dealt with as such by the labor laws. It therefore but respects the will of Congress to contain the antitrust laws as applied to labor activity within the compass that *Allen Bradley* marks. This means that the antitrust laws have no application within the area of mandatory bargaining, and without that area apply only to actual union abetment of an independent conspiracy of businessmen. Each avenue of this approach is separately essential in the litigation of a labor antitrust case. Deferring for the moment the question of exclusive primary jurisdiction, the judicial proceeding can be shortened and sharpened whenever, as the proof develops either at trial or pretrial, it appears that the challenged agreement is either upon a mandatory subject of bargaining, or, whatever its subject, it was reached as a result of arm's length bargaining. As in this case, when the District Court dismissed the complaint against Associated Food Retailers at the close of Jewel's case for lack of evidence of conspiracy, it should not have been possible to continue the trial against the unions on the view that "plaintiff sought relief from the defendant unions apart from the theory of conspiracy . . ." (R. 662, 684).

At all events, to analyze the issues in terms of classes of agreements and categories of qualifications, with accompanying subrefinements and reservations, is unmanageably diffuse and invites decision by inclination. It would loose a powerful retrogressive impetus not soon contained.

II. REPLY TO THE GOVERNMENT'S POSITION ON EXCLUSIVE PRIMARY JURISDICTION

Under both petitioners' and the Government's view, it is crucially relevant to ascertain whether the contested agreement is upon a mandatory subject of collective bargaining. The Government nevertheless takes the position that exclusive primary jurisdiction to decide this

question does not reside with the National Labor Relations Board. In supporting this position the Government treats with every case but the one presently before the Court.

1. On the face of its complaint Jewel spells out either protected or prohibited activity under the terms of the National Labor Relations Act on the unions' part. The complaint in so many words alleges that the unions "have insisted" upon the inclusion of the limitation upon market operating hours in their labor agreements (R. 24, ¶ 19). If that limitation is a nonmandatory bargaining subject, insistence upon it is a classic refusal-to-bargain; if that limitation is a mandatory bargaining subject, insistence upon it is classic protected activity. The complaint thus places the controversy squarely within the NLRB's ambit. And even at the pleading stage the face of the complaint does not exhaust the considerations relevant to invocation of primary jurisdiction. As this Court has explained (*United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 487):

> In the first place, while the allegations of the bill must be taken as true upon the motion to dismiss, they still are subject to challenge by pleading and proof if the motion be denied. We cannot assume that, in a proceeding before the board in which the whole case would be open, similar allegations will not be denied or met by countervailing affirmative averments. . . . And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter.

On the face of the complaint and the foreseeable scope of its litigation, therefore, the controversy was within the conventional reach of the NLRB's jurisdiction. With respect to a state action to enjoin a violation of a state restraint-of-trade statute, this Court ruled that "where

the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance." *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 481. Since this is true of a state action to enforce a state antitrust law, the question simply is why the same is not true of a federal action to enforce a federal antitrust law.

2. The Government asserts that a suitable procedure for securing an administrative determination is unavailable. It urges, first, that the NLRB General Counsel "could have refused to issue a complaint and thus terminated any administrative proceeding at the outset" (Govt. br. p. 75).

Bypassing the administrative proceeding is not justified by the abstract anticipation that the General Counsel might not act even if his power to proceed were invoked. It would be one thing to say that, having sought but failed to secure action by him, the requirement of prior administrative recourse has been satisfied. It is quite another thing to say, without any attempt to secure action by him, that prior resort is unnecessary because it might prove fruitless. Satisfying the General Counsel that he should act is surely not so futile a quest that even the attempt to set the statute in motion may be dispensed with altogether.

A claim based on possible inaction, where no action has been sought, is therefore clearly premature. More fundamentally, the possibility that the General Counsel might not issue a complaint, described by this Court as part of a "narrow area" of the regulatory scheme, did not deter this Court from concluding that state action was preempted. Treated as peripheral rather than central, the

Court noted that (*San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245-246):

> . . . the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, *or by refusal of the General Counsel to file a charge* [*i.e.*, issue a complaint], or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. [Emphasis supplied.]

State action is nevertheless preempted even in this "narrow area" because to allow it "involves too great a danger of conflict with national labor policy" (*id.* at 246). The danger to "national labor policy" is not less by reason of the misapplication of the Sherman Act than of state enactments. The risk is identical whether a federal court rather than a state court acts on the hypothesis that a subject is not within the scope of mandatory bargaining when the NLRB might find otherwise.

The Government's emphasis on the possible refusal to issue a complaint, besides expanding the significance of the "narrow area" and overlooking the dislocation of the "national labor policy," also diminishes the stature of the officer who makes the determination. The General Counsel is the prosecutory arm of the NLRB. In him is invested "general supervision over all attorneys employed by the Board . . . and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect to the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board." NLRA, § 3(d). His role "is a major one. . . . He vindicates the public interest, performing functions previously performed by the Board itself." *Lewis* v. *N.L.R.B.*, 357 U.S. 10, 15-16. His refnsal tp issue a complaint on the ground that there is no reasonable cause to believe that a violation has been committed is the responsible and informed determination

of the very officer to whom Congress has entrusted just this decision. It means that the charging party has been unable to establish to the satisfaction of the responsible prosecutory official that there is even a *prima facie* showing of a violation. It is in keeping with the National Labor Relations Act and does not demean the Sherman Act to decline prosecution of an antitrust complaint on an assumption in conflict with that determination. Where the identical issue is critical and common to both the National Labor Relations Act and the Sherman Act, there is no reason to allow the antitrust action to go through the door when the unfair labor practice proceeding is stopped at the threshold.

The Government's stress of the role of the General Counsel particularizes its apparent general position that the doctrine of primary jurisdiction does not apply if the administrative agency is permitted in its discretion rather than required to act on a complaint filed with it (Govt. br. p. 74). This generalization does not stand up. This Court has pointed out the intended similarity of the procedures under the Federal Trade Commission Act and the National Labor Relations Act. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 268. As with the NLRB (*ibid.*), the jurisdiction of the FTC is discretionary, not obligatory, and it acts on outside behest only if to do so is in the public interest. *F.T.C.* v. *Klesner*, 280 U.S. 19. Nevertheless, the Court of Appeals for the Fourth Circuit, as a matter of course, in considering the validity under the antitrust laws of a permanent plan allocating selling time among warehousemen, suspended the District Court's approval of the plan and remanded "the action with directions to the District Court to seek the advice of the Federal Trade Commission upon the validity and administration of the permanent plan." *Danville Tobacco Association* v. *Bryant-Buckner Association*, 333 F.2d 202, 203, 207, 209 (C.A. 4).

3. In alternative support of its position that a suitable procedure for securing an administrative determination is unavailable, the Government asserts that in "the present case . . . neither the unions' demand for the market-hours clause, nor the execution of the agreement containing it, constituted an unfair labor practice, and there would be no basis in the Labor Act for the Board to pass upon the question whether the clause related to 'terms and conditions of employment'" (Govt. br. p. 78). Inexplicably omitted from this formulation is that the unions insisted upon the clause. Insistence was alleged, amply proved, and found as a fact (R. 672). And insistence upon a nonmandatory subject of bargaining is simply and plainly the unfair labor practice of refusal-to-bargain. The ensuing inclusion of the clause in the agreement as a result of successful insistence does not oust the NLRB of power to determine whether the clause was the subject of mandatory or permissive bargaining, and insistence upon it hence lawful or unlawful, nor does it deprive the NLRB of power to render effective relief if unlawful insistence is found. Inclusion of the clause in the agreement following unlawful insistence was indeed the precise situation in *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 344-347, and expressly found by the NLRB to be an irrelevant circumstance, 113 NLRB 1288, 1309, 1326-27. See also, *International Longshoremen's Association*, 118 NLRB 1481, 1482-83, remanded, 277 F.2d 681 (C.A.D.C.). This is but the particularization of the familiar principle that the inclusion of a contested clause in an agreement does not moot the question whether it is the product of unlawful bargaining or other unfair labor practices. *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 396-400 and n. 4; *N.L.R.B.* v. *Erie Resistor Corp.*, 373 US. 221, 222-224, 237, n. 14, order enforced on remand, 328 F.2d 723, 726-727 (C.A. 3).

It is true that to negotiate and reach an agreement upon a permissive subject of bargaining without insistence is

not an unfair labor practice. But that is not this case. Moreover, even in the situation where the element of insistence is lacking, and therefore no unfair labor practice exists, it is by no means clear that there could not and should not be referral to the NLRB for initial determination of the question whether a particular subject is within or without the scope of mandatory bargaining when that issue is critical to the prosecution of an antitrust action. Power exists. Section 5(d) of the Administrative Procedure Act provides that: "The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."[18] When an antitrust action brings into issue the placement of a subject within or without the scope of mandatory bargaining, a dispute is created by the adverse position of the parties on the question and the diverse legal consequences which flow from one or another classification; NLRB determination of the question would surely "remove uncertainty," and, were the NLRB to decide that the controverted subject was within the scope of mandatory bargaining, it might indeed "terminate a controversy." The declaratory order would be subject to judicial review in the same way as an order issued in an unfair labor practice proceeding,[19] so that a definitive disposition of the critical question within the statutory framework of the NLRA would be assured. The NLRB has devised a declaratory procedure by which, whenever "a party to a proceeding before any agency or court of any State or Territory," or the "agency or court" itself, "is in doubt whether the Board would assert jurisdiction on the basis of its current jurisdictional standards," the party, agency, or court

[18] 60 Stat. 239, 5 U.S.C. § 1004(d).

[19] Legislative History, Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess., 263, 362; and see *id.* 25, 204, 227, 248, 316. See also, *National Van Lines, Inc.* v. *United States*, 326 F.2d 362 (C.A. 7).

"may file a petition with the Board for an advisory opinion on whether it would assert jurisdiction on the basis of its current standards." 29 C.F.R. §§.102.98-102.104, 101.39-101.40. There is no reason why a similar procedure should not be available to secure agency determination of a critical substantive issue committed to administrative competence which arises in an antitrust action.[20] The substantial countervailing argument is that, as issuance of a complaint by the General Counsel is the precondition of NLRB adjudication in an unfair labor practice proceeding, it would be inconsistent with the statutory scheme to permit direct access to the NLRB via the declaratory route. But that objection is easily met by providing that the availability of a declaratory proceeding is dependent on a preliminary determination by the General Counsel that the situation is an appropriate one for a declaration. Whatever doubt exists should be resolved in favor of agency competence to act, for "where the problem lies within the purview of the Board, . . . Congress must have intended to give it authority that was ample to deal with the evil at hand." *Pan American Airways* v. *United States,* 371 U.S. 296, 312.

In any event, the difficulty is present only where insistence upon a contested clause is not part of the union's conduct, and that difficulty is plainly absent in this case. There is no reason to forego agency action where it can be available because there may be other situations where it may not be available.

4. Like the possibility that the General Counsel would not issue a complaint although his power to act was not invoked, and like the preoccupation with the situation where insistence does not appear although it plainly ap-

[20] "That the agency has no power to grant the relief sought is not a reason for refusing to require prior resort to the agency, if the case involves a question within the agency's special competence." 3 Davis, Admin. Law Treatise, § 19.07, p. 40 (1958).

pears here, the Government adds a third consideration unrelated to this case. It urges that the six-month period of limitations contained in § 10(b) of the NLRA is too short for discovery or investigation of most antitrust violations, so that access to the NLRB would be time-barred before the antitrust action could be begun (Govt. br. pp. 80-81). In this case, however, the claim of antitrust violation was contemporaneous with its alleged occurrence, and nothing prevented prompt recourse to the NLRB except Jewel's disinclination to proceed before it. Furthermore, in this situation, insistence on the union's part is virtually certain in any of the periodic contract negotiations in which any employer chooses to raise the question. The Government thus asserts a limitations question which is nonexistent on this record.

Nor is the Government's treatment of its hypothetical limitations question persuasive. An unfair labor practice proceeding can be time-barred without for that reason precluding referral to the NLRB of an issue within its competence which arises in a timely-brought antitrust action. That was this Court's precise holding in the exactly analagous situation in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 70-74, where the running of the two-year limitations period on complaints cognizable by the ICC was urged to bar referral by the Court of Claims to the ICC of an issue within that agency's competence which arose in the course of a timely action brought before the Court of Claims. This Court ruled that the ICC period of limitations "does not deal with referral of questions to the Commission incident to judicial proceedings. . . . [Limitations policy is] aimed at lawsuits, not at the consideration of particular issues in lawsuits. . . . We hold . . . that the limitation [on proceedings before the ICC] . . . does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commission's primary jurisdiction. . . ." *Id.* at 72, 74. Rather than to pass it over without mention, it

would perhaps be better were the Government to explain why the *Western Pacific* reasoning is inapplicable to its hypothetical question or to pretermit the question until a case arises in which it is presented.

5. Also foreign to any issue in this case is the Government's claim that in a civil governmental antitrust action prior recourse to the NLRB "would represent a sharp break with the traditional practice before that agency," that in a criminal antitrust action "it certainly cannot be assumed that Congress intended to condition criminal cases upon such an administrative determination," and that "there cannot be a different rule as to the Board's primary jurisdiction depending upon whether the issue arises in a civil or criminal case" (Govt. br. pp. 79-80). It would be enough to say that, were it true that prior recourse would be inappropriate in a governmental antitrust action, it would be very far from showing that it is inappropriate in a private antitrust action. And it is with a private action that we deal. But the premise of the inappropriateness of prior recourse in a governmental antitrust action, civil or criminal, is itself highly dubious.

(a) The Government's claim pertaining to its institution of a civil antitrust action can be given the same short shift that this Court gave it in *Far East Conference* v. *United States*, 342 U.S. 570. In a civil antitrust action instituted by a private shipper prior recourse to the Federal Maritime Board is required, *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, and the same is true where it is the Government that brings the action, *Far East Conference* v. *United States*, 342 U.S. 570. "The sole distinction between the *Cunard Case* and . . . [*Far East*] is that there a private shipper invoked the Antitrust Acts and here it is the Government. This difference does not touch the factors that determined the *Cunard Case*. The same considerations of administrative expertise apply, whoever initiates the action. The same Antitrust Laws

and the same Shipping Act apply to the same dual-rate system. To the same extent they define the appropriate orbits of action as between court and Maritime Board." *Id.* at 576. And the suggestion that the United States might not be deemed a "person" eligible to file a complaint with the Maritime Board was dismissed as a "debating point," "almost frivolous," over which one "ought not to dally . . ." (*ibid.*).

Accordingly, once determined that recourse to the NLRB is required of a private litigant, identical recourse by the Government follows as a matter of course. It is no break with tradition to require the Government to proceed before an administrative agency, and to add the NLRB to the list is a small wrench.

(b) Since prior recourse to the administrative agency is demonstrably required of the United States in a civil antitrust action brought by it, and since the Government seems to claim that the same is not true in a criminal action, it has itself shown that the two types can diverge from one another upon the question of the applicability of the doctrine of primary jurisdiction. Obviously they can. The question is whether they should.

It has been suggested that the rationale of *Far East* undercuts the result in earlier cases in which primary jurisdiction was not applied in a criminal antitrust action. 3 Davis, Admin. Law Treatise, § 19.06, p. 35 (1958). One District Court has so held. "All the arguments in favor of letting an experienced administrative board exercise its primary jurisdiction applies with equal force in a criminal case as in a civil case. The rationale applicable to the two types of action is the same." *United States* v. *Alaska S.S. Co.*, 110 F. Supp. 104, 111 (W.D. Wash.). The need for expertness and uniformity is not less because the Government seeks to fine or jail a man rather than to enjoin him. *Cf., United States* v. *Hutcheson*, 312 U.S. 219, 234-235. This Court has held that a State may not apply criminal

sanctions to require that a carrier secure a state certificate for intrastate operation without prior recourse to the Interstate Commerce Commission to determine whether the carrier's conduct conformed with an ICC certificate issued to it under the Motor Carrier Act. *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171. See also, *Jones Motor Co.* v. *P. P.U.C.*, 361 U.S. 11. Resort to the administrative agency is thus required of a State as a precondition to institution of criminal prosecution by it. In this area of activity the difference between a State and the United States is not apparent.[21]

(c) Accordingly, any inference that the Government would draw of the inapplicability of the doctrine of primary jurisdiction in a private antitrust action, based on its assumed inappropriateness in either civil or criminal governmental actions, is too dubious to be valid. And that is enough for today.

6. Apart from the claimed unavailability of a suitable procedure by which to secure NLRB adjudication, the Gov-

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[21] The Government suggests that to permit "an administrative agency to decide portions of a criminal case might present serious constitutional questions involving the right to trial by jury" (Govt. br. p. 80). Like much of its argument, the suggestion is too offhand to be worthwhile. Overlooked is that administrative determination of an issue under safeguards of adequate notice, hearing, and appeal has been sustained as a sufficient predicate for a criminal prosecution (*Yakus* v. *United States*, 321 U.S. 414, 431-443), with explicit reliance on primary jurisdiction as analogous (*id.* at 433); furthermore, the determination whether a subject is within or without the scope of mandatory bargaining might be considered a question of law not within the province of the jury in any event; finally, an administrative determination adverse to the alleged offender might be treated differently from a favorable determination. The article which the Government cites is a carefully qualified statement which seems to exclude the present situation from its concern. Lastly, whichever way it turns, the Government must still face the propriety of jailing a man on a hypothesis which the administrative agency in whose special competence the determination lies might reject.

ernment urges that the statutory design of the NLRA is opposed to primary jurisdiction (Govt. br. pp. 81-85). We turn to this contention.

(a) The preemption rationale is obviously apposite to support primary jurisdiction as part of the dominant statutory drive to channel through the NLRB labor questions over which it has cognizance. The Government counters that "the preemption doctrine is largely designed, not to prevent courts from adjudicating questions which the Board can adjudicate, but to bar the application of substantive State law upsetting the balance of power between labor and management expressed in the national labor policy" (Govt. br. pp. 81-82). The Government turns the evolution of preemption in the labor field on its head. The original premise of the preemption of state action was that not even a federal court could act in a dispute committed to adjudication by the NLRB (Pet. br. pp. 111-112). And a federal court could not act even though the source of right invoked before it was the NLRA itself.[22] For identity in substantive law could not assure uniformity of interpretation and application were adjudication dispersed among the multitude of federal courts. Not the source of law invoked, but the conduct committed to control through the NLRB, was thus from the beginning the critical determinant in excluding federal no less than state court action. This was explicitly articulated by this Court. "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal. . . . A multiplicity of tribu-

[22] *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183 (C.A. 4); *Amalgamated Association* v. *Dixie Motor Coach Corp.*, 170 F.2d 902 (C.A. 8); *California Association* v. *Building Trades Council*, 178 F.2d 175 (C.A. 9); *Schatte* v. *Theatrical Stage Employees*, 182 F.2d 158, 165-166 (C.A. 9), cert. denied, 340 U.S. 827; *Van Zandt* v. *McKee*, 202 F.2d 490 (C.A. 5).

nals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters Union,* 346 U.S. 485, 490-491. Action by a state court is thus precluded, as had like action by a federal court from the very outset, even though it is the NLRA itself that the state court undertakes to enforce. *Local Union No. 25, Teamsters* v. *N.Y., N.H. & Hart. RR. Co.,* 350 U.S. 155, 158, 161. When at issue "is conduct of which the National Act has taken hold . . . a State cannot afford a remedy parallel to that provided by the Act." *Amalgamated Meat Cutters* v. *Fairlawn Meats,* 353 U.S. 20, 23. Accordingly, contrary to the Government's contention, dissimilar state substantive law accentuates, but does not explain, the reason for preemption.

(b) As evidence of a statutory design inconsistent with primary jurisdiction, the Government relies upon judicial power to redress as a breach of contract conduct which also constitutes an unfair labor practice (Govt. br. p. 82). This is extraordinarily uncritical. Judicial power is allowable in this area, whether by means of direct enforcement or as an adjunct to arbitration, because it is compatible with collective bargaining and fulfills the efforts of the employer and the union to put and keep their own house in order.[23] It promotes the autonomous relationship of management and labor which is the law's high aspiration. But the NLRB's control remains paramount in the case of judicial enforcement of a contract insofar as it duplicates the statutory duty. *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95, 101, n. 9. And so too of arbitration. The Board defers "provided the procedure was a fair one and the results not repugnant to the Act"; in case of conflict "the Board's ruling would, of course, take precedence;" "The superior authority of the Board may be invoked at any

[23] Dunau, *Contractual Prohibition Of Unfair Labor Practices: Jurisdictional Problems,* 57 Colum. L. Rev. 52 (1957).

time." *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270-272. In all this there is no slightest intimation that the NLRB's role is secondary or the judicial role parallel. On the contrary, the power of the NLRB to intervene when the contractual remedy goes awry strongly supports the appropriateness of primary jurisdiction. For it recognizes the special competence of the NLRB in the overlap area and this is the keystone of primary jurisdiction.

(c) Conduct which constitutes an unfair labor practice under § 8(b)(4) of the NLRA—roughly secondary boycotts and jurisdictional disputes—also gives rise to an action under § 303 of the Labor Management Relations Act for money damages to compensate for the harm the conduct caused enforceable by the injured private party in a state or federal court independently of the NLRB. *Teamsters Local 20* v. *Morton*, 377 U.S. 252. Relying upon this statutory exception, and a minority report supporting a rejected proposal, the Government urges that Congress has itself repudiated the need for oversight by the NLRB. (Govt. br. p. 83). But the history of this exception discloses just the opposite.

In 1947, a minority of the Senate Labor Committee proposed, and Senator Ball thereafter introduced and strongly supported, an amendment which would allow private persons direct recourse to federal district courts for injunctions to restrain § 8(b)(4) violations only substantially free of the restrictions of the Norris-LaGuardia Act. S. Rep. No. 105, 80th Cong., 1st Sess., 54-56; 93 Cong. Rec. 4834-4838. After much discussion, the proposal was voted down. 93 Cong. Rec. 4847. Rejection was based on two grounds. Enforcement was deemed more suitably entrusted to administrative processes exclusively controlled by a specialized expert agency in which precipitate action would be guarded against by preliminary investigation. It was also feared that private recourse to injunctive relief

uncontrolled by the safeguards of the Norris-LaGuardia Act would reintroduce familiar abuses. 93 Cong. Rec. 4834-4847, 4864, 4868, 6446, 4132-4133, S. Rep. No. 105, 80th Cong., 1st Sess. 56.

Illustrative of the sentiment which prevailed are the statements of Senators Ives, Morse, and Smith. Senator Ives stated that (93 Cong. Rec. 4839):

> * * * [The] proposal revives the injunction upon the request of an employer. * * * I deplore a condition which in any way, shape, or manner will revive the flagrant abuses which brought about the enactment of the Norris-LaGuardia Act. I think the pending amendment opens the door; it is the entering wedge.

Senator Morse declared (93 Cong. Rec. 4841):

> It has been my consistent endeavor while this legislation has been under discussion to vest determination of labor problems so far as it is humanly possible to do so in a single organization that is expert in labor problems. I assume that if the debates on this bill have served no other purpose they have demonstrated to all Members of the Senate the complexity and difficulty of this field. Labor problems are complex; as complex, indeed, as our entire social structure, since the great mass of our people are workers. It is a field which has been growing even more complex as our society has come to depend more and more upon the output of large industrial enterprises. Nor will these problems be simplified if the legislation which we have here proposed becomes law. Close day-to-day contact with these problems is necessary if able persons are to keep themselves even reasonably informed.
>
> I am confident, despite the high regard in which I hold the district judges of the United States, that they have neither the background, the desire, or the time, to become experts in these matters. It is one thing to grant to the district courts, upon application of the Board, an interim power to maintain the status quo pending resolution of the problem by the body

which we have selected as the expert body to handle such problems. It is quite a different thing to do what this bill proposes, namely, to throw these matters for final decision into the laps of the approximately 250 district judges of the United States, some of whom may have some knowledge of the field, but all of whom can certainly not pretend to be experts. * * *

* * * I cannot be convinced that it is sound legislation to disperse the authority over these problems, to draw into the orbit of their handling, a host of district attorneys and Federal judges without competence in the field or, by splitting up authority among all the district attorneys and district judges of the land, to make impossible the development of a uniform body of precedent and decisions, harmoniously integrated with each other over the entire economy.

Senator Smith said (93 Cong. Rec. 4843):

> We decided, after debating the question, that instead of opening these cases to direct attack by employers aggrieved, it was wiser to consider them as unfair labor practices, and put them under the National Labor Relations Board. I feel that as we have broadened the scope of the National Labor Relations Board and the scope of the Wagner Act to include unfair labor practices by labor organizations as well as by employers, our logical procedure in dealing with these questions is through the Board, placing the responsibility on the Board to deal with such cases, whether on the one side or the other.

Congress specifically and deliberately chose, in short, to retain the "administrative law approach," and rejected the "so-called court approach." 93 Cong. Rec. 4132. Impressed "that opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional strikes seems to be so strong," Senator Taft offered as a compromise alternative the creation of a cause of action *for money damages only* for the conduct proscribed by § 8(b)(4) as unfair labor practices. 93 Cong. Rec. 4843-4844. § 303 of the Labor Management Relations Act, em-

bodying this compromise, was thereafter introduced and enacted. 93 Cong. Rec. 4858-4860, 4874.

The history of this limited statutory exception, confined to money damages for a narrow class of violations, confirms that for the main body of regulated activity Congress sought the benefits of expertness and uniformity through centralized administration. The Government's contrary inference would draw meaning from an isolated reading of the exception to the exclusion of the dominant design. This was not the way this Court read the statutory scheme when it fashioned the preemption doctrine, nor should it be read that way in considering the like demands of primary jurisdiction.

7. In this case, through the Government's brief, the NLRB has expressed its judgment that market operating hours constitutes a mandatory subject of collective bargaining. By this means the function of primary jurisdiction has for this case been indirectly served. But the question remains for the future. Few cases can command this Court's attention, and the benefit of the NLRB's judgment is ordinarily unavailable at a lesser level outside its own procedures. The administrative determination should in any event enter at the commencement of the proceeding, not for the first time at its climax. And it should be the product of the discipline of the agency's own procedures, not come merely by way of amicus participation in another proceeding.

It would be foolish to say that there are no perplexities to be solved in meshing recourse to the NLRB with an antitrust action. But granted, as it is, that the issue comes "within the special competence of the administrative agency" (Govt. br. p. 73), procedural problems are to be solved, not used as reasons for rejecting primary jurisdiction. We ought not to add judicial immobility to Judge Learned Hand's distress that when administrative agencies "get into grooves, then God say you to get them out

of the grooves."[24] Nor has this been the way of judicial statescraft. Otherwise *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, would never have been born. For *Abilene* as the pioneer of primary jurisdiction was fashioned "in a situation where the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction." *Far East Conference* v. *United States*, 342 U.S. 570, 575. It "was one of those creative judicial labors whereby modern administrative law is being developed as part of our traditional system of law." *Ibid.* This case is part of this mainstream. The governing philosophy, stated in another context but applicable here as well, is that "court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action." *United States* v. *Morgan*, 307 U.S. 183, 191. See also, *Whitney National Bank* v. *Bank of New Orleans*, Nos. 26, 36, Oct. Term 1964, decided Jan. 18, 1965.

III. REPLY TO JEWEL'S ATTACK UPON THE DISTRICT COURT'S UNDISTURBED FINDINGS OF FACT

1. At the heart of Jewel's position is its view that the District Court's findings of fact were "wholly swept aside" by the Court of Appeals (Res. br. pp. 2-3, 4, 11, 14). But those findings were unreversed and irreversible.

Jewel's freewheeling is barred by Rule 52(a) of the Federal Rules of Civil Procedure: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of

[24] Hand, The Spirit of Liberty, 241-242 (3d ed. 1960).

the credibility of the witnesses." The finality which attaches to findings "unless clearly erroneous" extends to all elements of the fact equation, whether weight, inference, or credibility,[25] including "factual inferences from undisputed basic facts. . . ."[26] "It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was a conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony."[27] So too a "choice between two permissible views of the weight of evidence is not 'clearly erroneous.' "[28] Hence, as the Court of Appeals has uniformly held, "This rule applies to all reasonable inferences of the trial judge, for it is for him to determine the propriety of the inferences and conclusions to be drawn. His is the primary function of finding the facts and choosing from amongst conflicting factual inferences those which he considers most reasonable. Even where there is no dispute about the facts, if different reasonable inferences may be drawn from the evidence, we are forbidden to disturb the findings based on such inferences unless they are clearly erroneous."[29]

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[25] *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U.S. 605, 609-610; *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-342; *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394; *Walling* v. *General Industries Co.*, 330 U.S. 545, 550; *Anderson* v. *Clemens Pottery Co.*, 328 U.S. 680, 689.

[26] *C.I.R.* v. *Duberstein*, 363 U.S. 278, 291.

[27] Note of Advisory Committee on Rules for Civil Procedure to Rule 52, Fed. R. Civ. Proc.

[28] *United States* v. *Yellow Cab. Co.*, 338 U.S. 338, 342.

[29] *Central Ry. Signal Co.* v. *Longden*, 194 F.2d 310, 317 (C.A. 7); *McDermott* v. *Baumgarth Co.*, 286 F.2d 864, 868 (C.A. 7); *Snorgrass* v. *Sears, Roebuck and Co.*, 275 F.2d 691, 693 (C.A. 7); *Shapiro* v. *Rubens*, 166 F.2d 659, 665, 666 (C.A. 7). And see, *United States* v. *Allinger*, 275 F.2d 421, 423 (C.A. 6); *United States* v. *Aluminum Co.*, 148 F.2d 425, 433 (C.A. 2).

The District Court's findings of fact thus came to the Court of Appeals armored by the "clearly erroneous" rule and that court's correct understanding of the finality it extends. And the findings have enhanced value because they are not the uncritical regurgitation of submitted findings but are "the product of the workings of the district judge's mind" evincing a conscientious thinking through of the evidentiary material. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657. Those findings were not and could not be disturbed. True, the Court of Appeals stated that the record "sustains the *material* allegations of the complaint" (R. 692-693, emphasis supplied), but the key word is "material." The Court of Appeals did not set aside findings but instead rendered them irrelevant based on its view of the law. In that court's view there were only two facts relevant to show a violation: (a) the fact of the limitation of market operating hours, and (b) the fact that its incorporation in the collective bargaining agreement resulted from the process of joint negotiations. The Court of Appeals did not deny the labor attributes of the limitation, but held that determination of marketing hours was an exclusive managerial function, with the consequence that the business hours fixed by the merchant controlled the working hours required of his employees regardless of the detrimental impact on the laborer of the hours of the day and the days of the week that work would be compelled.[30] Similarly, the Court of Appeals did not deny that no union-businessmen conspiracy existed, but held that it was unnecessary, it sufficing that an agreement was reached as a result of

[30] Contrast this Court's decision in *Amalgamated Association* v. *W.E.R.B.*, 340 U.S. 383. The Wisconsin Public Utility Anti-Strike Law, Wis. Stat., 1949, § 111.58, provided that, in the event of arbitration of new contract terms, "The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business. . . ." This Court cited the application of this provision as one example of "direct conflict" with the National Labor Relations Act. 340 U.S. at 398-399.

joint negotiations even though the bargaining was at arm's-length. The Court of Appeals thus accepted the findings but innovated new rules of law which deprived the findings of materiality.

Furthermore, to say that the Court of Appeals undid the findings is to attribute to it displacement of pivotal factual determinations without a word in the opinion either identifying the disfavored finding or explaining the reason for its rejection. It would thus impute to that court irresponsibility in the extreme. That is not the posture of this case. We have simply undisturbed findings giving rise to divergent views of the law pertinent to ascertainment of their legal consquences. Insofar as the findings go, therefore, they come here protected not only by the "clearly erroneous" rule but sheltered in addition by the two-court rule. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275.

2. Jewel's attempt to undo the findings is a hodgepodge of irrelevancy, inaccuracy, attenuated inference, and emphasis of peripheral circumstances. It reveals both the invulnerability of the findings and the danger of exposing labor activity to the tactic of making a virtue of weak evidence by the cliche that "the conspirators were loath to confess their real objectives" (Res. br. p. 24). We treat Jewel's points substantially in the order it makes them.

(a) Although the "sale" of the product is in terms within the work jurisdiction of the butcher under the self-service contract (R. 46-47), Jewel urges that this is a misnomer because the sale is not completed until the cashier collects the money from the customer (Res. br. p. 3, n. 1), and butchers are not salesmen (*id.* at 13-14). Jewel ignores the fact that the heart of salesmanship consists, not in col-

lecting the customer's money, but in persuading the customer to buy the product by instilling confidence in the quality, price, and service. Customer satisfaction with the self-service method of vending meat drastically diminishes without a butcher in attendance to provide custom cutting and other personal service essential to selling (Pet. br. pp. 50-53). This is one element in the District Court's finding that it is impractical to operate a self-service meat department without butchers or other employees on duty. This factor cannot be explained away by the assertion, totally without evidentiary support, that the reference to "sale" in the self-service contract is "doubtless . . . a carry-over of the traditional language from the service market contracts . . ." (Res. br. p. 3, n. 1).

(b) To show that the limitation of market operating hours goes beyond fulfilling the butchers' wish not to work at night and to protect their work from being taken by others, Jewel relies on a newspaper story appended to its brief (Res. br. pp. 3, 57). We do not pause to consider whether the story supports its view or not. For we rely on the findings, based on the record, for our position. We think it a fair measure of Jewel's undisciplined treatment of facts that an extra-record newspaper story, constituting the rankest hearsay, is solemnly invoked as a solid basis for importuning the exercise of judicial judgment favorable to it.

(c) Jewel urges that the contractual limitation of market operating hours originated in 1947, not 1919 (Res. br. pp. 5-7).

(*i*) Dating the limitation from 1947 was a brand new thought which Jewel expressed for the first time in the Court of Appeals but had not presented to the District Court. It is axiomatic that no matter may be urged on appeal which has not been tendered in the trial court. In particular, a plaintiff "must" at the least adhere "to the theory of facts" it "presented at the trial." *Peters* v.

Fitzpatrick, 310 F.2d 704, 706 (C.A. 7). Jewel's theory of facts at trial is in conflict with its theory on appeal. In its complaint (R. 22, ¶ 15), and in its proposed finding of fact 15, Jewel in the District Court dated the limitation as "Beginning at least 10 years ago. . . ." That would make it July 1948 as of the time the complaint was filed and December 1952 as of the time the finding was proposed. The new 1947 date was on appeal picked from the thin air just as the abandoned 1948 and 1952 dates had been.

(*ii*) Jewel picks 1947 because the agreement executed that year, under the heading "Working Hours," contained the words "Market operating hours shall be 9:00 A.M. to 6:00 P.M., MONDAY THROUGH SATURDAY, inclusive" (R. 128x, Art. III(c), Res. br. p. 6). These words were new. But the 1947 agreement, like all preceding and subsequent agreements, also contained the words, with variations as to the specific hours, "It is expressly understood that no customer shall be served who comes into the market before or after the hours set forth . . ." (Pet. br. pp. 14-15). It is the latter prohibition which, from 1920 to the present, operates to close the market at night. The new words incorporated in 1947 added nothing to this limitation. The reason for the new words is clear on the face of the 1947 agreement. It specified the working hours as 8:30 A.M. to 6:00 P.M., Monday through Saturday, and the marketing hours as 9:00 a.m. to 6:00 p.m., Monday through Saturday (R. 128x, Art. III(a)(c)). Because of the one-half hour earlier starting time for work, it was necessary separately to list the marketing hours. That was not true of the preceding 1946 agreement where the starting time for work and marketing was the same (R. 124x, 125x, Art. III(a), VII(a)).

(*iii*) Jewel ascribes the new 1947 words to union anticipation of self-service meat department operation (Res. br. p. 6). This is fanciful. All that the record shows is that "prior to 1948, we [Jewel] made surveys across the country and the growth of self-service markets" (R. 157). It

would have taken remarkable clairvoyance for the unions in 1947 to change the agreements—assuming, indeed, that the changed wording originated with the unions at all—based on unknown "surveys" by Jewel at an unspecified time "prior to 1948."

(*iv*) Jewel states that "the record does not show," and by that device impliedly suggests, that "in the 1920's and early 1930's" the market may have remained open at night, with the owner-butcher doing the work, and with the union butchers going off duty (Res. br. p. 6). The record does not show this because it shows just the opposite. The contracts from the beginning were explicit that "no customers will be served . . ." (Pet. br. p. 14), not that a customer may be served but only by an owner-butcher. And the contracts were also explicit that overtime would be performed only "behind locked doors . . ." (*ibid.*). A market does not remain open behind locked doors. Finally, the evidence is explicit that union officials "went around to the markets . . . to . . . close them down . . . on Sundays and at nights after 6 o'clock . . ." (Pet. br. p. 48).

The District Court's finding is thus surely right, not clearly erroneous, in fixing 1919 as the origin of the limitation upon market operating hours

(d) Jewel asserts that "Among the advantages of self-service and longer hours is the fact that both reduce the capital cost per item sold" (Res. br. pp. 8, 48-49). There is no evidence to support this assertion. As the District Court found, "even if the self-service meat departments could operate at night without employees, there is no showing that such operations would result in economies or lower prices" (R. 677). The showing that exists is the other way. Those stories in which Jewel sells fresh meat after 6:00 p.m. earn much *less* than those in which fresh meat is not sold after 6:00 p.m. (Pet. writ of cert. pp. 42-44, 36a-39a).

And Jewel's praise of the self-service system of vending is pointless (Res. br. p. 8). The collective bargaining agree-

ments explicitly provide that any food store operator is entirely free to choose either the service or self-service method as he pleases (Pet. br. p. 8). Nothing in the limitation upon market operating hours prevents a retailer from operating a self-service market rather than a service market if that is his wish. As of December 20, 1961, Jewel operated 206 self-service markets and 15 service markets (Pet. br. p. 9). The limitation does not prevent Jewel, or any other operator, from converting all its markets to the self-service system. Indeed, since the great trend is towards self-service operation (Pet. br. pp. 9-10), it is apparent that the limitation does not disfavor self-service vending.[21]

(e) Disregarding irrelevance, Jewel's stress of the inconvenience to consumers resulting from the absence of night shopping is vastly overstated (Res. br. pp. 8-9). Thus:

(*i*) The very witnesses called to testify to personal inconvenience showed that each had ample shopping time. Helen Kmiotek's husband is home each day at 4:00 p.m., and she herself has Friday off (R. 318-319); Rosemary Gioia has the family car available to her three of the five weekdays (R. 321); Helen Mueller's work day ceases at 3:00 p.m. and her husband is home all of the day (R. 322-323); Mary Ann Bearley's work day ceases at 1:00 p.m. and her husband is home all of the day (R. 323-324); Roberta Applebaum is home all day (R. 325); Jane Glick works with her husband and is usually free by 5:00 p.m. (R. 327). From the city of Chicago these persons were

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[21] Just as pointless is Jewel's assertion that self-service vending does not impair employment or union strength (Res. br. pp. 7, 48-49). The issue is not whether one method of vending is better than another, but whether men shall work at night, as would be required under either system. It may be noted, for the sake of accuracy, that Jewel's tabulation of "Butchers Employed" by chains other than Jewel is erroneous (Res. br. p. 7); the arithmetic is wrong, and it fails to take into account the absence of figures showing the employment of journeymen and apprentices by A & P in 1957.

the prime examples of inconvenience that Jewel was able to muster, yet all have ample opportunity to shop during the week not to speak of Saturday.

(*ii*) Jewel states that, of 66 percent of the public that normally uses a car for shopping, "56% of the public does not ordinarily have a car available for shopping purposes during daytime hours Monday through Friday" (Res. br. p. 8). This is a grossly distorted statement. The study on which the statement is based states that 56 percent "cannot drive or car is not normally available on weekdays" (R. 29x). If the person cannot drive he cannot possibly be relying on an auto to shop. Furthermore, the study itself shows that the auto is normally available during weekdays, in most cases every day of the week, with only 13 percent of the group which was sampled stating that the car was not available any day of the week (R. 30x). Also distorted is Jewel's statement that consumers had to buy an unsatisfactory food to substitute for meat (Res. br. p. 9). The study states that 14 to 24 percent of the group sampled reported that they "Have had an experience where an unsatisfactory substitute had to be served to family" (R. 29x). As the maker of the study testified (R. 311):

> Q. The answers to the question "Have you had an unsatisfactory experience," for a woman of sixty-five could cover any unsatisfactory experience at any time during the sixty-five years of her life, is that right?
>
> A. Yes.
>
> Q. So that this could cover one unsatisfactory experience during the lifetime of any one of the interviewees, is that correct?
>
> A. Yes.

(*iii*) The survey conducted by Jewel shows that, despite a lengthly propaganda statement on the questionnaire submitted to the customers (R. 23x), of the 100,000 questionnaires distributed (R. 150), Jewel received a total return of but 18,775 of which 2,028 stated that they did not desire night shopping (R. 24x). What is noteworthy

about the survey is, not that 16,747 expressed a preference for night shopping one or more nights a week, but that 81,225 were so indifferent to the matter that they did not even bother to execute the questionnaire. Thus, of the 800 distributed at the 339 Madison store, there were 34 returns; of the 600 distributed at the 1518 Morse store, there were 9 returns; of the 600 distributed at the 3318 Bryn Mawr store, there were 2 returns; of the 1,000 distributed at the 8938 Commercial store, there were 9 returns (def. ex. 2, pp. 4, 5, 6, 7). And these stores are representative.

(f) Jewel contends that the allowable sale of poultry after 6:00 p.m. without employees on duty, in contrast to the limitation on the sale of fresh meat, shows that the purpose of the limitation is anticompetitive rather than betterment of wages, hours and working conditions (Res. br. pp. 10, 14, 48). This attenuated inference is destroyed by the history of the sale of poultry.

The sale of "frozen fresh poultry, cut-up or whole" after 6:00 p.m. originated with the 1955-1956 agreements (*cf.* R. 162x, 167x *with* R. 153x, 154x, 157x). The employers had urged that, since frozen poultry was obtainable after 6:00 p.m. in competing papa and mama stores and in delicatessen stores, it should be available for sale in their own stores after 6:00 p.m.; the unions acceded to this request in fairness to the employers who employed the butchers represented by them (R. 600, 613). The sale of "fresh poultry, cut-up or whole, processed on the premises" originated with the 1957-1959 agreements (*cf.* R. 162x, 167x, *with* R. 33, 47). The sale of frozen poultry after 6:00 p.m. granted in 1955 had made inroads into the sale of fresh poultry; preparation of fresh poultry for sale is the work of the butchers represented by the unions and this work was being lost as a result of the inroads from the sale of frozen poultry; to safeguard the work of the butchers they represented the unions agreed to the sale of fresh poultry after 6:00 p.m. (R. 600, 613).

There is thus nothing sinister in the allowable sale of poultry after 6:00 p.m. The post-6:00 p.m. sale of "frozen fresh poultry" originated in response to the employers' plea that relaxation of the limitation was necessary to meet competition; it is therefore procompetitive. The extension of post-6:00 p.m. sale to "fresh poultry" originated in the need to safeguard the work of butchers from loss to others; it is therefore rooted in work protection. No "logic" requires that, because poultry is sold after 6:00 p.m., fresh meat must be too. The products, problems, and history are different. Indeed, the contractual treatment of "fresh beef, veal, lamb, mutton or pork" as a special self-contained product group (Pet. br. p. 8) corresponds with the use of the same classification by the United States Department of Agriculture.[32] And, if the true objection to the 6:00 p.m. limitation on the sale of fresh meat is the exception of poultry from it, that can easily be remedied (and Jewel's logic served) by eliminating the exception. More fundamentally, human behavior is not controlled or explained by a syllogism. Compromise and adjustment is the best that people can manage in labor relations as elsewhere.

(g) Jewel also inveighs against a 1955 agreement authorizing the Cry-O-Vac wrapping of hams off the premises, such hams *not* to be sold after 6:00 p.m. (R. 110, 116, Res. br. pp. 10-11). To wrap hams off the premises means that the work is to be performed by employees other than the meat department employees. Surely the unions have the right to bargain on the subject of whether certain work will be done by the employees within the meat department or by others. And surely, if the unions agree that the work may be done by others, they are also free to agree that all employers may do it by others, just as

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[32] Meat Consumption Trends and Patterns, Agriculture Handbook No. 187, 4, 23, 34 (U.S. Dept. Agric. 1960).

Jewel has always insisted should be the case (Pet. br. pp. 12-13).

(h) Jewel urges that the 54 contractual marketing hours in the week, in contrast with the 40 contractual straight-time working hours during the week, shows that the limitation upon marketing hours is unrelated to control of working hours (Res. br. pp. 12-13). This is silly. There is only one ending time and that is 6:00 p.m. for both working and marketing. True, the agreements provide that "At the Employer's discretion overtime at overtime rates may be worked after eight (8) hours in any one day *and behind locked doors after 6:00 p.m.*" (R. 17x, 18x, § 4.4, emphasis supplied). But since overtime after 6:00 p.m. may be worked only "behind locked doors," and therefore when the market is closed for business, there is minimal occasion for it (Pet. br. p. 11, n. 3). Performance of overtime after 6:00 p.m. is "relatively rare"; there is "Practically none" (Pet. br. p. 11). What is "relatively rare" would be turned into regular routine were the market open for business after 6:00 p.m. And that is the nub of the matter.

(i) Jewel contends that "No counter service by butchers is necessary in a self-service market" (Res. br. p. 7), and urges its experience in the Gary-Hammond area in Indiana in support (Res. br. p. 14). But even in that area meat cutters are on duty at least two nights a week, may be on duty additional nights a week as volume of business requires, and are not on duty only if business is light (Pet. br. 53-54, 69). Indeed, Jewel's chief negotiator testified in his deposition, and did not at trial disclaim his answer as accurate to his knowledge, that "In Lake County, Indiana, we are required to have a meat cutter on duty only on Thursdays and Fridays. We are usually open five nights a week. We usually have a meat cutter on duty on Mondays and Tuesdays, in addition to Thursdays and Fridays. Wednesday is a pretty light night, and some of our markets will

not have a meat cutter on duty on those nights" (R. 548). Since this was the information known to Jewel's chief negotiator, it is obviously the information on which he acted in the course of negotiations, and it is therefore artificial in the extreme to suppose that either he or any other negotiator could or would be bargaining on the fictive assumption that employees were unnecessary to night operation of meat departments.

Jewel urges that the possibility of operation of self-service meat departments without employees is apparent from the contractual distinction between "service," "self-service," and "semi-self-service" market operation (R. 30-31, 45, Res. br. p. 15). Jewel utterly misconceives the import of the contracts. Since the contracts are based on the presence of butchers on duty whenever the market is open for the sale of fresh meat, the defined distinction between a service and self-service market is obviously not predicated on the absence of butchers from work. Rather, the distinction is based upon whether the butcher is working in accordance with the service or self-service method of merchandising, and simply states that if a mixed method is used in the sale of fresh meat the market is self-service (R. 30-31, 45). But whatever method is used the contracts contemplate that a butcher will be at work. Jewel's argument is thus devoid of merit, and the more so because presented for the first time to the Court of Appeals, the District Court not having been favored with this particular distortion.

Jewel urges that its claim of the possibility of self-service operation without employees is not belated, it having alleged in its complaint that "there is no necessity for members of the defendant unions being on duty in plaintiff's stores at all hours at which meats are actually purchased by customers; that the incidental tasks of arranging the cuts in the cases and cleaning the cases need not be performed continuously throughout store hours and can be performed by others or can be performed by butchers

some hours prior to the ending of store hours". (R. 20, Res. br. p. 15). The claim that the work "can be performed by others" underscores the reality of the unions' fear of loss of work and the necessity of guarding against it. And the alternative that the work need not be done by anyone was unproved by Jewel and disproved by the unions. Jewel is so enamored with its complaint that it forgets that it could not prove what it alleged.

Jewel scoffs the expert opinion expressing the view that self-service operation without employees is unsatisfactory, urging further that "it is not up to Courts to tell merchants how to run a store" (Res. br. p. 18). But the District Judge saw and heard the experts and fully accepted their testimony as reliable and accurate. The *nisi prius* determination of this matter is conclusive. The antitrust laws do not require judges or unions to surrender their brains to the ukase of a merchant. To Jewel's assertion that we should not be reluctant to put self-service meat operation without employees to the test if we are so certain that it cannot work (Res. br. pp. 18-19), it is enough to say that we are unwilling to experiment with a suggestion that a person can live without oxygen to negate another's foolhardy belief that maybe death will not result. A notion that would be laughed at when expressed at the bargaining table need not be taken seriously just because voiced in the court room. Nor does Jewel face up to the detrimental consequences to the working welfare of the employees of self-service operation of meat departments without personnel even if it could be done (Pet. br. pp. 49-50, 70-73).

Finally, Jewel asserts that its promise that no personnel would be utilized in a self-service meat department to vend fresh meat after 6:00 p.m. should be enough to allay the union's fear of loss of work (Res. br. pp. 20-22). The unions' experience in policing the employers' performance of their present promise not to use personnel in vending products within the unions' jurisdiction that are excepted from the 6:00 p.m. limitation on sale inspires them with

no confidence that the promise would be kept (Pet. br. pp. 49, 68).[33] In any event, "We need not assume that an employer would use such a tactic as here discussed; it is enough that the union could fear it, and seek such a clause to prevent it." *Meat and Highway Drivers Local Union No. 710* v. *N.L.R.B.*, 335 F.2d 709, 716 (C.A.D.C.).

(j) Jewel asserts that if work load is increased by self-service meat operation without personnel, the unions are free to bargain for an increase in staff to carry the added volume of work (Res. br. p. 19). So they are. But there is certainly no assurance that they would succeed and thus no assurance that the added volume of work would not be absorbed by increasing the load of the existing complement of employees without hiring new help. In seeking to preserve the existing work load from increase, the unions are entitled to take a position in favor of the *status quo* and so avoid guessing whether extension of

[33] The instance of cheating uncovered in the very course of trial is ascribed by Jewel to entrapment by a disgruntled former Jewel butcher, one Walter Santeler (Res. br. pp. 20-21). Insofar as this is an attack on the witness' credibility, it is enough that the District Court saw, heard, and believed him. This is conclusive. And the cold record fully supports his reliability. At the time of trial the witness was employed as a head meat cutter at A&P (R. 474), for whom he had been working since May 1961 (R. 481, 482); he had worked for Jewel from January 1947 until May 1961, progressing from apprentice to head meatcutter (R. 476); he was used by Jewel to open the meat markets in new stores (R. 477-478, 480, 481); he resigned from Jewel in May 1961 because he was not given other jobs which would fit him for advancement (R. 481, 505-506, 514). His was not opinion testimony. He related objective, naked facts which, if inaccurate, were easily capable of contradiction by witnesses produced by Jewel. None were produced. His testimony is wholly uncontroverted. As to hamburger "adulterated" by the witness (Res. br. p. 20, n. 5), the incident occurred in April 1959, more than two years before his resignation in May 1961, and brought nothing but a reprimand (R. 33x). One incident in fourteen years of employment is the mark of an exemplary work record. It takes a good deal more than this to taint a witness as a liar on a cold record.

marketing hours would or would not adversely dislocate the existing work load.

(k) Apparently for the purpose of stigmatizing Carl Bromann, secretary and treasurer of Associated Food Retailers, as a conspirator, Jewel relies upon a conversation between Bromann and E. T. Vorbeck, Jewel's chief negotiator (Res. br. pp. 22-23). On October 11, 1957, at Bromann's office, Vorbeck threatened Bromann that he and Associated would be named as co-defendants in a lawsuit if a satisfactory modification of the marketing hours limitation was not negotiated (R. 378, 558-559). To justify this threat, Vorbeck stated to Bromann that Associated was "one of the principal opponents to the extension of night-operating hours . . ." (*ibid.*). Jewel relies upon this accusation, but there is not an iota of evidentiary support for it, and accusation does not substitute for evidence. Jewel states that "Bromann did not deny the accusation when it was made" (Res. br. p. 23), but neither did he affirm it, and no adverse inference can be drawn from Bromann's disinclination to debate the subject with his accuser. On his part, Vorbeck did not deny, but did not recall, whether Bromann said, "Why single out Associated, we're just one of the people on the contract, just like you," and whether he "did not mention the fact that he and you and all other employers were in the same position" (R. 378). Jewel also asserts that the unions did not call Bromann to the stand to deny the accusation (Res. br. p. 23). But evidence, not accusation, calls for contradicting evidence. Furthermore, there would in any event be no occasion for the unions to call Bromann, for the District Court had already found that he was not a conspirator and he is of course not a representative of the unions. And Jewel could have called Bromann just as well.[34]

(l) Jewel contends that the limitation upon market operating hours "contributed only one thing to the agree-

[34] Jewel's description (Res. br. p. 23) of Associated's position on market operating hours is hopelessly garbled (Pet. br. pp. 86-88).

ment—it eliminated convenience of shopping hours as an element of competition" (Res. br. pp. 24, 41). But Jewel did not even establish its premise that post-6:00 p.m. shopping would introduce a significant competitive difference. There is no evidence of variation in the unregulated trading hours of grocery departments among competitors, and therefore no showing that disparate shopping hours actually exist as a competitive factor. The evidence is indeed the other way. In general all food stores within a competitive area operate the same number of hours (R. 546). Extension of market operating hours in meat departments therefore foreseeably means, not that competitors will operate their meat departments at different hours of the night, but that within a competitive area the same hours will prevail whatever they are as is the current situation in the grocery departments. Since rival meat departments can be expected to operate the same number of night hours, it can make no competitive difference whether they are open to 6:00 p.m. or later. The additional hours cannot affect the net amount of meat sold, or the price, by any particular store; it will only spread over more hours the sale of the same quantity of meat of the same quality at the same price.[35]

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[35] *Amici* supporting Jewel assert that the limitation upon selling time of fresh meat to 6:00 p.m., in contrast with the later selling time of other foods said to be substitutes for fresh meat, results in a decrease in the sale of fresh meat and an increase in the sale of other foods. Irrelevant to the questions on which the writ was granted, the assertion is baseless in any event.

Amici echo a thought newly introduced by Jewel in the Court of Appeals on the second appeal. On the first appeal Jewel had argued that night vending of fresh meat would increase its sales of other products as well; both were supposed to suffer from lack of night vending (br. p. 29). At the trial it sought to prove that night vending increases not only sales of fresh meat but total sales of all products; both were supposed to benefit from night vending of fresh meat; as expressed by Jewel's counsel, the "more meat we can sell the more groceries we can sell" (Tr. 186, 187). But the proof actually showed that Jewel's total sales of all products in

(m) Jewel contends that one objective of the limitation of market operating hours is to benefit service markets as against self-service markets (Res. br. p. 25). But the testimony upon which reliance is placed shows, as we have already detailed (Pet. br. pp. 50, 70-71), that the relationship between service and self-service meat departments is such that marketing hours must be alike in both if the butchers' desire not to work at night and not to lose work is to be fulfilled, objects having nothing to do with suppression of commercial competition or preferring one merchandising method over another. To withhold lab[illegible] from both the service and self-service markets, while al-

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its stores which vend meat *after* 6:00 p.m. are often much less than, and never more than about the same as, total sales of all products in its stores which do *not* sell fresh meat after 6:00 p.m. (Pet. writ cert. pp. 42-44, 36a-39a); neither fresh meat nor other products are either advantaged or disadvantaged by the presence or absence of night vending of fresh meat. Thus, having failed to prove its first assertion at trial, Jewel on appeal advanced an inconsistent assertion which it had never before made and for which it had no evidence at all.

Two giant fallacies underlie the assertion that the 6:00 p.m. closing time results in lesser sales of fresh meat and greater sales of other foods. First is the assumption, confessed to be no more than that (R. 168), that 54 daylight hours per week within which to buy fresh meat is not enough for the consumer to buy all he needs or wants. The findings and evidence contradict this assumption (Pet. br. p. 72, n. 11). It is one thing to say that some consumers may be inconvenienced by lack of night shopping; it is quite another thing to say that any consumer actually buys less fresh meat because it is sometimes inconvenient to purchase it before sundown. Fifty-four daylight hours are ample access to the market.

The second giant fallacy is the assumption that as a matter of actual dietary habit consumers do substitute other foods for fresh meat. Persons who want to eat steak or lamb chops do not buy fish, chicken, frankfurters, or TV dinners. Given dietary habits as they exist, and ample access to the market during 54 daylight hours per week, it is the sheerest speculation to assert that consumers "are driven to use meat substitutes . . ." (Res. br. p. 48).

(Jewel's briefs in the court below on the two appeals have been lodged with the Clerk of this Court).

lowing the self-service markets to operate without employees (assuming that could be done), would obviously discriminate in favor of self-service vending and give it a distinct competitive advantage over service vending. The resulting competitive superiority of self-service vending would result only from the different consequences of the unavailability of labor to each type of market. And it is elementary that the elimination of that part of competition which is based on differences in labor standards is altogether outside the Sherman Act construing it least favorably to the allowability of labor activity. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503-504.

(n) Jewel stresses a 1954 letter from R. Emmett Kelly to the members in which, in opposing "night meat sales," Kelly stated that "True American ideals call for a free enterprise system wherein our members should have rightful opportunity of someday owning their own business" (R. 2x, 95-96), a sentiment against which Jewel inveighs as showing that the purpose of the marketing hours limitation is to "facilitate the transfer of butchers from the employee to owner class . . ." (Res. br. p. 25). A single isolated statement in 1954, during a year when no bargaining negotiations took place (R. 577), is hardly the stuff which fixes the reason for a 45-year old policy. Nor do we apologize for the sentiment expressed. It is completely consistent with the antitrust laws. The bedrock of the antitrust law is, "because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few"; "one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." L. Hand, J., in *United States* v. *Aluminum Co.*, 148 F.2d 416, 427, 429 (C.A. 2). Movement from worker to entrepreneur is part

of what we mean when we speak with pride of our classless society.[36]

(o) Another wisp on which Jewel seizes, to show a union "intention to soften competition between the so-called 'chains' and so-called 'independents,'" is the statement attributed to union representative Nielubowski that "We are going to protect the independent fellow" (Res. br. pp. 26-27). This statement does not even identify who "the independent fellow" is or how he was to be protected. Furthermore, the statement was made on November 27, 1957, *after* agreement had already been reached with all local unions except Local 189 (R. 570), and was made in a context which had nothing to do with market operating hours. The remark was made in response to a proposal for a flexible work day in groups 2 and 1A of Local 189, and in group 2 there has always been night operations and in group 1A night operations were obtained in the 1957 negotiations (R. 570-572).[37]

(p) This long discussion does not exhaust the inadequacy of Jewel's showing. But we end it because if we have not by now demonstrated its tenuous character, we never can. We add only that Jewel's technique is frustratingly difficult to treat with. The half-truth uttered in a casual sentence requires a page to put it in context. The scattering of innuendo is in the same class. So too is the jumble of unconnected facts oriented by no principle which gives them relevance and harbored finally only in an appeal to

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[36] The testimony attributed to Kelly as a verbatim quotation at page 26 of respondent's brief, beginning with the words "I meant by that," simply does not exist in the record in the form presented (R. 95), and its reproduction as a quotation of the witness is inexcusable granting the broadest license to the zeal of advocacy.

[37] At page 27 of its brief, Jewel translates the words "nobody profits" into "stabilizing profits," a distortion that the context of the statement (R. 131) makes so clear that it again exceeds the advocate's license.

prejudice. The technique illustrates one reason why Congress withdrew labor activity from the arbitrament of the antitrust laws when the union acts in its self-interest free of abetment of an independent businessmen's conspiracy.

3. Jewel asserts that "labor is beyond the scope of its exemption when it restrains trade beyond what is essential to fix terms and conditions of employment" (Res. br. p. 52). This is the key to the invalidity of Jewel's position. For Congress did not commission judges and juries to decide whether the bargain which fixes terms and conditions of employment is not enough, just about right, or too much. Whether the wages are too high in *Pennington*, or the hours too short in *Jewel*, is a question for collective bargaining, not the antitrust laws.

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